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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 767

CLARENCE SMALDONE, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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No._____

CLARENCE SMALDONE, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered in the above entitled case on July 19, 1965.

## OPINION BELOW

The opinion of the Colorado Supreme Court, printed in Appendix A hereto, infra p. 7, is reported in 405 P.2d 208.

## JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on July 19, 1965 (Appendix A). Rehearing was denied on September 13, 1965 (Appendix B). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3). The petitioner herein asserted his rights against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution when he was called to testify before a State Grand Jury (R. Exhibit B). The trial court held the petitioner in contempt of the Grand Jury and the Court (R. 37). The contempt conviction was upheld by the Supreme Court of the State of Colorado (Appendix A). All questions raised herein were raised in the trial court and argued in the Colorado Supreme Court.

## QUESTION PRESENTED

Whether a United States citizen who is summoned to testify before a State Grand Jury and refuses to answer questions invoking his right against self-incrimination under the provisions of the Fifth and the Fourteenth Amendments to the United States Constitution, has had his rights violated when he is held guilty of criminal contempt under the following circumstances:

a) The witness was never given a clear-cut choice in that he was never ordered by the Court to answer any question;

b) The witness was never advised of his rights while in the Grand Jury room;

c) The witness was interrogated before the Grand

Jury in the presence of prosecution investigators who were not sworn and whose presence was unauthorized;

d) The witness was subjected to summary *in camera* proceedings in which the Court did not discuss the nature of any specific question asked by the Grand Jury and imposed a contempt sentence without making any order directing the witness to answer.

## CONSTITUTION INVOLVED

Amendment V:

". . . nor shall any person . . . be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV:

Section 1

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT

A Jefferson County Colorado Grand Jury was empaneled and sworn on March 5, 1963 (R. 13). In addition to the persons who usually are present there were present two District Attorney's investigators (R. 13-14).

The petitioner was subpoenaed to appear before the Grand Jury on August 29, 1963 (R. Exhibit B).

After stating his name and address, the petitioner, who was at no time advised of his rigths, refused to answer other questions and invoked his rights against self-incrimination under the Fifth and Fourteenth Amendment to the Constitution of the United States (R. Exhibit B).

After the petitioner had been questioned, he was told by the District Attorney to appear before the trial judge the next morning (R. Exhibit B). The petitioner appeared on August 30, 1963, (R. 30), and the matter was continued until September 3, 1963 (R. 31). All proceedings were *in camera* (R. 30).

On September 3, 1963 the petitioner appeared before the Court at 9:50 a.m. (R. 35). Within ten minutes the Court found the witness in contempt (R. 37). The Court did not order the petitioner to answer any question and the Court did not discuss any question (R. 36).

Thereafter, on September 6, 1963 the witness' motions for new trial and arrest of judgment, based on constitutional grounds, were filed (R. 3-6). On December 5, 1963 the trial court denied the motions (R. 44). The petitioner is presently on bond awaiting the determination of this writ after the Colorado Supreme Court's opinion (Appendix A) and denial of petitioner's motion for rehearing (Appendix B).

## REASONS FOR GRANTING THE WRIT

The Supreme Court of Colorado reversed two companion cases (Appendix C) and in the case of petitioner their opinion (Appendix A) is in direct conflict with this Court's opinion in the case of *In Re Oliver,* 333 U. S. 257 (Appendix D), infra page 25.

The Opinion of the Colorado Supreme Court in this case is also in conflict with the opinion of this Court in the case of *Quinn* v. *United States,* 349 U. S. 155, 99 L.Ed. 964, 75 S.Ct. 688 (1954). In the *Quinn* case, Chief Justice Warren, stated:

> "In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under § 192 for refusal to answer that question.
>
> "Was petitioner so apprised here? At no time did the committee specifically overrule his objection based on the Fifth Amendment; nor did the committee indicate its overruling the objection by specifically directing petitioner to answer. In the absence of such committee action, petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt." Id. at 166, 99 L.Ed. at 974, 75 S.Ct. at 675.

Settlement of the questions presented herein by this Court is plainly in the interest of uniform rights of citizens of the United States in matters relating to the question of self-incrimination. All questions raised herein were raised in the trial court and argued in the Colorado Supreme Court.

## CONCLUSION

**For the foregoing reasons this petition for a writ of certiorari should be granted.**

**Respectfully submitted,**

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***Counsel for Petitioner***

# APPENDIX A

## NO. 20953

CLARENCE SMALDONE,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of Jefferson County

Honorable George G. Priest, Judge

EN BANC

JUDGMENT AFFIRMED

Mr. Edward S. Barlock
Mr. C. J. Berardini

Attorneys for Plaintiff in Error

Mr. Duke W. Dunbar, Attorney General
Mr. Frank E. Hickey, Deputy Attorney General
Mr. John E. Bush, Assistant Attorney General

Attorneys for Defendant in Error.

MR. JUSTICE McWILLIAMS delivered the opinion of the Court.

Pursuant to subpoena Clarence Smaldone, hereinafter referred to either by name or as the witness, appeared before a grand jury then sitting in Jefferson County, which body according to the District Attorney had been empaneled to "probe gambling activities in the Denver Metropolitan area."

After being sworn the witness in response to questions propounded to him by the District Attorney gave

only his name and address and then refused to answer a series of questions put to him by the District Attorney, his refusal being on the ground that his answers thereto "might tend to incriminate me, invoking my rights as a citizen under Article II, section 18 of the Colorado Constitution, and under the Fifth Amendment of the Constitution of the United States." In response to a specific inquiry, the witness stated that he would make "the same answer," which was an unequivocal refusal to answer, to any and all questions which the District Attorney had asked—or might ask—of him.

Shortly thereafter the District Attorney caused the witness to be brought before the trial court in connection with his refusal to answer the several questions propounded to him by the District Attorney before the grand jury, asking "the court to determine whether or not these questions were proper, and, if so, order the witness to answer and if he refuses, hold him in contempt." Thereupon all of the questions which the witness had theretofore refused to answer before the grand jury were read to the court by the court reporter in the presence of the witness and his attorney.

Thereafter, in response to an inquiry by the court, the witness stated that even if directed to go before the grand jury and answer the questions which he had theretofore refused to answer, he would not do so and his answers would in each instance be the same as he had previously given, i.e. a complete refusal to answer any and all questions which the District Attorney might propound, save and except the perfunctory questions as to his name and address. Whereupon the trial court promptly held the witness to be in contempt and sentenced him to four

months in the county jail. By writ of error Clarence Smaldone now seeks reversal of the judgment finding him guilty of contempt.

In our view the action of the trial court under the circumstances was proper and the judgment of contempt must therefore be affirmed. In so holding we approve and adopt the rationale of *Enrichi v. United States,* 212 F.2d 702. In that case one Enrichi, appearing before a grand jury empaneled by the United States District Court for Colorado, in response to questions propounded to him gave only his name, age and address, and then refused to answer all other questions asked of him by the United States District Attorney on the ground that such might tend to incriminate him. Before the grand jury Enrichi categorically stated that he refused to answer any and all questions which might be propounded to him by the United States District Attorney, save and except the questions pertaining to name, age and address.

Thereafter, the matter was brought to the attention of the court. Upon hearing, the trial court "in effect" directed Enrichi to return to the grand jury room and answer those questions which were clearly not of an incriminating nature and to claim his constitutional right against answering questions which he believed in good faith would tend to incriminate him. And the trial court in that case then indicated that after such had been done, the court would then determine whether the refusals, if such there might be, were well-founded. It was in this setting that the attorney for Enrichi, after consultation between himself and the witness, advised the court that "if . . . [Enrichi] should go before the grand jury again, he would claim his privilege as he had already done."

Upon this record the trial court then proceeded to forthwith find Enrichi guilty of contempt and thereafter sentenced him to jail for a period of six months and also ordered him to pay a fine of $500.

It is to be noted that in *Enrichi v. United States, supra,* the court did not pass on the propriety of any particular question or series of questions propounded to the witness by the United States District Attorney before the grand jury. Nor did the court order the witness to answer any particular question or series of questions. Rather, the basis for the judgment of contempt was the statement of the witness that if he should go before the grand jury "he would claim his privilege as he had already done."

In affirming this judgment, on review, the United States Court of Appeals, Tenth Circuit, declared as follows:

> "It is unnecessary to a decision of this case to consider singly or in groups the questions propounded to appellant while a witness before the grand jury in respect to whether they were of such character that direct answers to them would tend to incriminate him or in respect to whether they were of such nature that to answer them would furnish a link in the chain of evidence needed in a prosecution of him for a crime or crimes under the laws of the United States. A stenographic transcript of the proceedings before the grand jury was attached to the petition for the order to show cause and was introduced in evidence on the hearing before the court. From such transcript it appeared that in addition to refusing to answer singly or seriatim the numerous questions propounded to him, in response to one question appellant stated

without condition or qualification that he refused to answer any questions; and in the course of the hearing before the court, the court called attention to such total refusal. The statement made to the court in the course of the hearing that if appellant again went before the grand jury he would again claim his privilege as he had theretofore done amounted to a reiteration of his blanket refusal to answer any questions asked by the grand jury. It was nothing short of a sweeping refusal in the presence of the court to reply to any and all questions which might be propounded to him in the grand jury room. That constituted completed criminal contempt in the presence of the court, within the purview of 18 U.S.C. § 401. And it was not protected by the Fifth Amendment."

Application of the so-called "blanket refusal" rule as set forth in the *Enrichi* case leads inevitably to the conclusion that Clarence Smaldone, like Enrichi, was also guilty of a "completed criminal contempt committed in the presence of the court." This type of contempt under well-established rules may with propriety be handled in summary fashion. See Rule 107(b), R.C.P. Colorado and *Wall v. District Court,* 146 Colo. 74, 360 P.2d 452.

Clarence Smaldone, like Enrichi, in the presence of the grand jury made a blanket refusal to answer any and all questions which might be propounded to him by the District Attorney. And thereafter, as in the *Enrichi* case, Clarence Smaldone done in the presence of the trial court reiterated his blanket refusal to answer all questions which had been asked of him before the grand jury or even questions which might have been asked of him before that body. In the instant case, as in the *Enrichi* case, it is the

act of defiance in refusing to answer any and all questions which might be asked of him, which act was committed by the witness in the presence of the court, that forms the basis for the judgment of contempt. Accordingly, we are not here concerned with an alleged contempt committed *outside* the presence of the court. Hence Clarence Smaldone's main contention that, at the most, his was an alleged contempt committed *outside* the presence of the court which could only be prosecuted upon appropriate notice is inapplicable and to no avail.

The other matters urged by Clarence Smaldone as grounds for reversal have been examined, but all are found to be wanting. The judgment is therefore affirmed.

## APPENDIX B

## 20953

## IN THE SUPREME COURT OF THE STATE OF COLORADO

CLARENCE SMALDONE,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of Jefferson County

The court having considered the motion of the plaintiff in error for a rehearing in said cause, it is this day ordered that said motion be, and the same hereby is, denied.

By the Court. En Banc. September 13, 1965.

## APPENDIX C

## NO. 20951

EUGENE SMALDONE,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of Jefferson County

Honorable George G. Priest, Judge

EN BANC — JUDGMENT REVERSED

Mr. Robert Bugdanowitz
Mr. Edward S. Barlock

Attorneys for Plaintiff in Error

Mr. Duke W. Dunbar, Attorney General
Mr. Frank E. Hickey, Deputy Attorney General
Mr. John E. Bush, Assistant Attorney General

Attorneys for Defendant in Error.

MR. JUSTICE McWILLIAMS delivered the opinion of the Court.

By writ of error Eugene Smaldone seeks reversal of an order of the trial court adjudging him guilty of contempt and sentencing him to the county jail for a period of four months.

Pursuant to subpoena, Eugene Smaldone, who will hereinafter be referred to as the witness, appeared before a grand jury then sitting in Jefferson County. The witness upon inquiry by the District Attorney gave his name, but

then refused to answer a series of questions propounded to him by the District Attorney on the grounds that his answers thereto might tend to incriminate him. The witness made it quite clear that he would not answer any question which the District Attorney might ask of him, save and except the perfunctory one as to his name.

The foregoing occurred shortly before 9 p.m. on August 29, 1963. The witness was immediately taken by the District Attorney before a trial judge who happened to be in the court house at the particular time. At this hearing the trial court held that the witness was justified in invoking his constitutional right against self-incrimination as to only two of the many questions asked of him, and that the balance of the questions were proper and not subject to the claim that an answer thereto by the witness might tend to incriminate him.

The trial court then asked the witness as to the questions asked of him before the grand jury, save and except as to the two questions which the court had just ruled might tend to incriminate, "would your answers to the remaining questions be the same"? The witness in response thereto inquired as to whether if he answered the questions he would thereby waive his right to claim his privilege as to other questions which might be asked of him by the District Attorney before the grand jury. The court answered this question in the negative, observing that the witness had "the right to invoke the Fifth Amendment at any time." Further colloquy occurred between the trial court and the witness concerning the geneneral subject of waiver, with the court finally concluding that the witness "must rely upon what your attorney tells you . . . I am just voicing what my feeling is and

of course I can be overruled at any time." It was in this context that the witness stated that his "answer is the same as I gave in the jury room." Thereupon the trial court proceeded to adjudge the witness to be in contempt and sentenced him to the county jail, no period of time being fixed by the court at this particular hearing.

If the contempt proceeding had been finally concluded at this hearing, the judgment and sentence under the circumstances would have been affirmed under the blanket refusal rule announced in *Enrichi v. United States,* 212 F.2d 702 and approved and adopted by us in Clarence *Smaldone v. People,* our number 20953, announced this date. But this hearing did not conclude the matter, as the trial court further advised the witness that "if he decided to appear before the grand jury and . . . answer the questions, he—of course—would be released from this contempt order." Hence, we must next proceed to examine the record of the subsequent hearing which was held as to this witness, in order to determine whether such required the trial court to "release" the witness from the contempt order or on the contrary justified the court in its continuing order that the witness was still in contempt of court.

Some seven days later the witness was again brought before the trial court. This hearing culminated in a finding by the court that the witness was still in contempt and in a sentence to the county jail, this time for a definite period of four months.

In our view the record of this later hearing fails to justify the action taken by the trial court. Specifically, such fails to disclose any blanket refusal by the witness

to reappear before the grand jury and answer questions propounded him by the District Attorney. On the contrary, the trial court itself noted that the witness on this occasion through his attorney agreed to go before the grand jury and answer those questions which the witness deemed would not tend to incriminate him. In this regard, it is to be noted that the witness agreed to answer most—but not all—of the questions theretofore propounded to him by the District Attorney before the grand jury.

At this particular point in the proceeding the trial court indicated that in view of the witness's statement as to his willingness to testify he should be afforded the further opportunity to appear before the grand jury. The District Attorney, however, objected to such procedure, insisting that the witness had to agree to answer *all* questions, excepting the two which the court had particularly ruled were improper. In this regard, it should be noted that the record fails to disclose just what questions propounded by the District Attorney the witness felt he could answer without incriminating himself, and which questions he would decline to answer on the ground that such would incriminate him. From an examination of the questions propounded the witness by the District Attorney before the grand jury it is quite evident that certain of the questions which the trial court held to be non-incriminating were in fact quite conceivably incriminating in nature. Hence, it is a little difficult to determine whether the witness's refusal to answer certain of the questions asked of him was proper or not. Be that as it may, it was at the urging of the District Attorney that the trial court decided to "stay with the original order" and again proceeded to adjudge the witness in contempt and sentenced him to the county jail for a period of four months.

The foregoing recital demonstrates that at the so-called second hearing the witness did *not* defy the trial court by asserting a blanket refusal to answer any and all questions before the grand jury. As a matter of fact, at this hearing the witness in the instant case volunteered to do that which in the *Enrichi* case the trial court directed Enrichi to do and which in response thereto Enrichi asserted his blanket refusal to answer any question, i.e. to return to the grand jury room and answer those questions that were not of an incriminating nature and to claim his constitutional right against answering such questions which he believed in good faith would tend to incriminate him. Hence, *Enrichi v. United States, supra,* does not control the present controversy.

The witness having thus withdrawn his prior blanket refusal to answer questions before the grand jury by agreeing to appear before the grand jury and to answer questions which did not incriminate him, and the record not disclosing any refusal to comply with an order of court that he answer any particular question, the trial court under such circumstances should have ordered that the witness be "released" from the contempt order and should have at that point in the proceeding followed his initial inclination and ordered the witness to reappear before the grand jury. Hence the judgment of contempt must be, and is, reversed for the reason set forth in *Clyde Smaldone v. People,* our number 20952 announced this date.

## APPENDIX C—(Continued)

## NO. 20952

CLYDE SMALDONE,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of Jefferson County

Honorable George G. Priest, Judge

EN BANC — JUDGMENT REVERSED

Mr. Edward S. Barlock
Mr. C. J. Berardini

Attorneys for Plaintiff in Error

Mr. Duke W. Dunbar, Attorney General
Mr. Frank E. Hickey, Deputy Attorney General
Mr. John E. Bush, Assistant Attorney General

Attorneys for Defendant in Error.

MR. JUSTICE McWILLIAMS delivered the opinion of the Court.

By writ of error Clyde Smaldone, who will hereinafter be referred to as the witness, seeks reversal of an order of the trial court adjudging him guilty of contempt and sentencing him to the county jail for a period of four months.

Pursuant to subpoena, the witness appeared before a grand jury then sitting in Jefferson County. In response

to questions propounded to him before that body by the District Attorney, the witness gave only his name and address, and then refused to answer a series of questions asked of him by the District Attorney on the ground that his answers thereto might incriminate him. In response to one particular question, the witness clearly indicated that it was his intention not to answer any question which the District Attorney might ask of him, save and except the perfunctory ones relating to name and address.

Thereafter the District Attorney caused the entire matter to be brought to the attention of the trial court. At the hearing in connection therewith the trial court indicated that all of the questions which the District Attorney put to the witness before the grand jury were proper, save and except for two, and that the witness's refusal to answer under the circumstances was improper. Whereupon the court next asked the witness "if the same questions were asked you by the grand jury . . ., except the ones pertaining to whether you were the same person convicted and sentenced to Leavenworth, and whether you had been in Federal prison, if those two were not asked, would your answer be the same to the other questions"?

In response to this inquiry, counsel for the witness made the following reply:

> "After consulting with counsel, Mr. Smaldone has authorized me to state to the court: that if he was specifically ordered to answer questions which the court felt would not by nature of a waiver of the constitutional protections, both under the State Constitution and the Federal Constitution, and upon specific order by this court to answer those questions in that category, that he will do so."

The trial court thereupon immediately proceeded to adjudge the witness guilty of a contempt and then sentenced him to the county jail for a period of four months. It is this judgment and sentence which the witness now seeks to reverse.

In urging that the judgment and sentence be affirmed, the Attorney General to a very considerable degree relies upon *Enrichi v. United States* 212 F.2d 702. From a careful reading of that opinion it is quite clear that it was the blanket refusal "in the presence of the court to reply to any and all questions which might be propounded to him in the grand jury room" which constituted a "completed criminal contempt committed in the very presence of the court" and formed the basis for the subsequent judgment of contempt. In the instant case did the witness in the presence of the court make a blanket refusal to answer any and all questions which had been, or might be, asked of him in the grand jury room? If so, such must somehow be found in the foregoing answer of the witness through his attorney, which answer has been set forth above in its entirety. In our view, this response does not constitute a blanket refusal as found in *Enrichi v. United States, supra.* Indeed, the response of the witness in the instant case is the very antithesis of a blanket refusal, in that the witness agreed to answer, if ordered. Hence, the witness having made no blanket refusal to answer, *Enrichi v. United States, supra,* does not control the present controversy.

From a reading of the record it is rather unclear as to just what formed the basis for the action taken by the court. There is the strong suggestion that the trial court was of the belief that the initial refusal of the witness to answer the questions propounded to him by the District

Attorney before a grand jury constituted contempt; especially when it was thereafter determined by the court that the question was one to which the claim of the constitutional right not to incriminate was improper.

If this was the thinking of the trial court, it was in error. The mere fact that a witness before a grand jury declines to answer a question propounded to him by the District Attorney does not in and of itself constitute contempt, be it of the grand jury or the court. The declination to answer under the particular circumstances of a given case may even be quite proper. For example, the question which the witness declines to answer may not be pertinent to the matter under investigation, or it may be such as is obviously designed to elicit an incriminating answer.

But even though the refusal to answer before the grand jury be subsequently determined to be improper, the initial refusal of a witness to answer questions propounded to him by the District Attorney before the grand jury does not in and of itself constitute contempt. If the District Attorney does not want to let the matter rest with the refusal of the witness to thus testify, the entire matter must then be brought to the attention of the trial court. Upon such hearing the trial court, among other things, must do the following:

(1) rule upon the propriety of the witness's refusal to answer the questions propounded to him by the District Attorney; and

(2) if the refusal to answer be held improper, to then order the witness to answer those questions which the trial court has thus determined are proper and to which a refusal to answer is improper.

When a witness is thus ordered to answer a question which he has theretofore declined to answer before the grand jury, he is then confronted with a clear-cut choice: either return to the grand jury and answer the question, or continue in his refusal an answer and thereby subject himself to a finding of contempt based on his refusal to obey the command of the court that he answer. As authority for the foregoing, see *Wyatt v. People,* 17 Colo. 252, 28 Pac. 961; *In re Hitson,* 177 Fed. Supp. 834; *Carlson v. United States,* 209 F.2d 209; and *Quinn v. United States,* 349 U. S. 155, 99 L.Ed 964, 75 S.Ct. 668.

Application of these principles to the instant case demonstrates that regardless of the theory upon which the trial court was proceeding, its order adjudging this particular witness to be in contempt under well-established rules was erroneous and cannot be permitted to stand. That is so unless we are prepared to hold that this witness because of his unsavory background has somehow lost his constitutional rights. This, of course, we cannot do. The sun rises on the evil as well as the good; the rain falls on the just and the unjust; and in like manner the several rights contained in the Federal and State Constitutions are bestowed upon all of us, the unwashed as well as the scrubbed.

Having thus determined that the witness is possessed of a constitutional right not to incriminate himself, the only remaining question is whether the circumstances the order adjudging him in contempt is proper. Under well-established rule he was not guilty of any contempt in his initial refusal to answer before the grand jury. And the record fails to disclose any disobedience by the witness of an order of the court that he answer a particular question

or series of questions. In fact we are unable to find any clear and unequivocal order of the trial court in this regard. If in some manner the several utterances of the trial court can somehow be equated into an order of court, the record still fails to disclose any defiance of such order. As noted above, in response to inquiry the witness, through his counsel, did not reiterate any blanket refusal to answer questions before the grand jury, but on the contrary indicated a willingness to reappear before the grand jury and testify.

The judgment is reversed.

## APPENDIX D

## NO. 215

## IN RE OLIVER

## CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Argued December 16, 1947—Decided March 8, 1948

In a habeas corpus proceeding, the State Supreme Court denied petitioner's release from imprisonment upon a sentence for contempt. 318 Mich. 7, 27 N. W. 2d 323. This Court granted certiorari. 332 U. S. 755. Reversed, p. 278.

MR. JUSTICE BLACK delivered the opinion of the Court.

A Michigan circuit judge summarily sent the petitioner to jail for contempt of court. We must determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment.

In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a "one-man grand jury" investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain. Two other circuit judges were present in an advisory capacity. A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that

the public was excluded—the questioning was secret in accordance with the traditional grand jury method.

After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story —that it did not "jell." This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-grand jury derived from the testimony of at least one other witness who had previously given evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed—that petitioner's story did not "jell"—the judge-grand jury immediately charged him with contempt, immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross-examine the other grand jury witness or to summon witnesses to refute the charge against him.

Three days later a lawyer filed on petitioner's behalf in the Michigan Supreme Court the petition for habeas corpus now under consideration. It alleged among other things that the petitioner's attorney had not been allowed to confer with him and that, to the best of the attorney's knowledge, the petitioner was not held in jail under any judgment, decree or execution, and was "not confined by virtue of any legal commitment directed to the sheriff as required by law." An order was then entered signed by the circuit judge that he had while "sitting as a One-Man

Grand Jury" convicted the petitioner of contempt of court because petitioner had testified "evasively" and had given "contradictory answers" to questions. The order directed that petitioner "be confined in the County Jail . . . for a period of sixty (60) days or until such time as he . . . shall appear and answer the questions heretofore propounded to him by this Court . . ."

The Supreme Court of Michigan, on grounds detailed in the companion case of *In re Hartley,* 317 Mich. 441, 27 N. W. 2d 48, rejected petitioner's contention that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chamber had deprived him of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment requires. *In re Oliver,* 318 Mich. 7, 27 N. W. 2d 323. We granted certiorari to consider these procedural due process questions.

• • •

The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge, and therefore we do not concern ourselves with that question. It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy. See, e. g., *Hale v. Henkel,* 201 U. S. 43, 58-66; *State v. Branch,* 68 N. C. 186. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end

of their investigation is either a report, a "no-bill" or an indictment. They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both. Thus our first question is this: Can an accused be tried and convicted for contempt of court in grand jury secrecy?

First. Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted *in*

*camera* in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception.

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an

instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. One need not wholly agree with a statement made on the subject by Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: "... suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerable efficient check, to oppose it. Without publicity, all other checks insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."

In giving content to the constitutional and statutory commands than an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial. But, unless in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody

else is denied entrance to the court, except the judge and his attaches. And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged. In *Gaines v. Washington*, 227 U. S. 81, 85-86, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts, but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

* * *

Second. We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge, namely, a contempt of court, committed, the State urges, in the court's actual presence.

* * *

Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out.

• • •

Nor is there any reason suggested why "demoralization of the court's authority" would have resulted from giving the petitioner a reasonable opportunity to appear and offer a defense in open court to a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts. The practice that has always been followed with recalcitrant grand jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other

testimony to be perjurers have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority."

It is "the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See *Chambers v. Florida,* 309 U. S. 227, 236-237. The petitioner was convicted without that kind of trial.

The judgment of the Supreme Court of Michigan is reversed and the cause is remanded to it for disposition not inconsistent with this opinion.

Reversed and remanded.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 767

CLARENCE SMALDONE, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent.*

## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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---

### PREFATORY STATEMENT

We deem the statement of facts contained in petitioner's brief to be substantially conclusory. We, therefore, deem it necessary to set forth a complete statement of ultimate fact, even though it may be to some extent repititious. The references to the record are to the folio not the page, since that state record has been filed in this court and is not presently available to respondent.

## SUPPLEMENTAL STATEMENT

At the time the grand jury proceedings initially were commenced, two investigators, Kechter and Hawley, were present (R., f. 31). The two investigators were introduced to the grand jury and introduced as being available to assist the grand jury (R., f. 34). The grand jury was instructed by the court that witnesses were to appear before the grand jury singly and without the presence of any other person except the district attorney and one assistant (R., f. 52). The investigators were present at the time the grand jury was ordered into session, which occured within the view of the court.

The petitioner, Clarence Smaldone, pursuant to subpoena, appeared before the grand jury. The petitioner gave his name and was asked if he had the nickname "Chauncey". Petitioner refused to answer. The district attorney then asked, "Do you intend to make that same response to all questions that I ask you?" The petitioner likewise refused to answer based upon his privilege against self-incrimination. The petitioner then gave his address and refused to answer the remaining questions. The remaining questions in substance were, are you married; were you at home on the evening of August 6, 1963. The district attorney then said he would ask some questions which were obviously not incriminating, to determine how contemptuous the petitioner was. These remaining questions were in substance, how old are you; are you married; do you have children; what is your business or occupation; and do you have any brothers and sisters. As to all of these questions, the petitioner persisted in his refusal to answer. The petitioner was directed to appear before the

court in the morning for determination as to whether his conduct constituted contempt. (See R., Exhibit B).

The witness appeared before the court at 9:10 A.M., Friday, August 30, 1963. Petitioner's counsel requested a continuance until 1:30 in the afternoon, which was granted (R., f. 84). At the afternoon hearing, petitioner's counsel made a second request for continuance, which was granted until September 3, 1963 (R., f. 87). The basis for the request was that counsel needed additional time to prepare.

Petitioner next appeared before the court at 9:50 A.M., Tuesday, September 3, 1963. At the commencement of the hearing, the trial court directed the exclusion of all persons who had no direct connection with the case, to which direction petitioner interposed no objection. Initially, the district attorney stated to the trial court that the purpose of the hearing was to determine whether the refusal to answer was proper, if not, to order the petitioner to answer and, upon continued refusal, to hold him in contempt (R., f. 91). The court directed the reporter to read the questions and answers, which was accomplished (R., f. 91). The court next asked the petitioner whether, if he were directed to answer these questions before the grand jury, at this time, "would your answers be the same?" The petitioner answered in the affirmative (R., f. 92). The court then ruled that failure of a person to respond to non-incriminating questions upon direction of the court constituted contempt (R., f. 95). This being the case, the court found the petitioner in contempt (R., f. 95).

## ARGUMENT

We will respond to the questions presented in the same order set forth by petitioner.

> *"The Witness Was Never Given A Clear-cut Choice In That He Was Never Ordered By The Court To Answer Any Question."*

This "question presented" is difficult to respond to, since it is not supported by ultimate fact, but only by petitioner's self-serving conclusion.

A cursory review of the ultimate facts reveals the pellucid dissimilarity between this case and *Quinn v. U. S.*, 349 U. S. 155, 99 L.Ed. 964, 75 S.Ct. 668 (1954), relied on by petitioner, assuming, arguendo, that its teachings are applicable to state proceedings.

After continued adherence to the blanket refusal to respond to any questions before the grand jury, petitioner was directed to appear before the district court for determination as to whether his conduct constituted contempt. When such hearing was held, after two continuances at the request of petitioner's counsel, the district attorney stated to the court that the purpose of the hearing was to determine whether or not the petitioner's blanket refusal to answer was proper; and if it was not, he requested the court to direct the witness to respond and, upon continued refusal, that the court hold petitioner in contempt. The court inquired of the petitioner whether, if he were directed to answer the questions before the grand jury at that time, would his answer be the same. The petitioner responded that he adhered to his blanket refusal. The

court then ruled that the failure of a person to respond to non-incriminating questions upon direction of the court constituted contempt.

The choice between compliance and non-compliance, and thereby risking appropriate punishment for non-compliance, could not be more "clear-cut."

*"The Witness Was Never Advised Of His Rights While In The Grand Jury Room."*

The relevancy of this point to the judgment of contempt under consideration is obscure. We are not here concerned with a criminal proceeding based in whole or part upon inculpatory testimony of the petitioner before a grand jury. Since petitioner fails to develop, argue, or support this "question" or otherwise frame it as a justiciable issue, we treat it in the same manner. More elemental is the fact that this issue was at no time presented to the trial court, and is therefore not properly before this court for the reason stated in our response to question four.

*"The Witness Was Interrogated Before The Grand Jury In The Presence Of Prosecution Investigators Who Were Not Sworn And Whose Presence Was Unauthorized"*

This "question" is equally obscure to the instant case. Firstly, although the presence of the investigators was not specifically ordered, it cannot be said, under the circumstances presented, that their presence was "unauthorized". Assuming, arguendo, that their presence was "unauthorized", what legal effect does such fact have on the judg-

ment of contempt? The only known legal effect is in support of a motion to quash the indictment when an unauthorized person is present during the taking of evidence and deliberations of the grand jury which results in the return of an indictment. Such is the minority rule. The better reasoned rule is that the presence of an unauthorized person under such circumstances, when the person is a public officer, does not nullify the indictment unless prejudice is shown. See annotation 4 ALR 2d 392. In no event does such fact nullify or destroy the jurisdiction or authority of the grand jury, which is the only legal result which would grant petitioner refuge in the instant case. Repetitiously, this question was not in any manner presented to the trial court.

> *"The Witness Was Subjected To Summary In Camera Proceedings In Which The Court Did Not Discuss The Nature Of Any Specific Question Asked By The Grand Jury And Imposed A Contempt Sentence Without Making Any Order Directing The Witness To Answer."*

In support of the fourth question, petitioner relies wholly on this court's decision in *In Re Oliver,* 333 U. S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The nature of the proceedings which incurred the umbrage of this court in *Oliver* was a grand jury proceedings which transformed into criminal proceedings instanter without benefit of counsel, knowledge of the nature of the charges, or basis thereof, right of confrontation or right to present evidence. Added to this was the refusal to supply a verbatim transcript of the grand jury proceedings resulting in the judgment of contempt. None of these factors exist in this case. Although alluding to the right of public hearing, as in-

dicated by this court, it was not called upon to determine the nature or extent of a person's right to a public trial in a state proceeding. Nor is this court called upon to so define in this case.

In Colorado, the extent of the right to a public hearing is clearly delineated. Indiscriminate exclusion of the public is prohibited. *Thompson v. People,* ..... Colo. ....., 399 P.2d 776 (1965). It goes without question, however, that such right may be waived by failure to object to the court's exclusionary order. *Benedict v. People,* 23 Colo. 126, 46 P. 437 (1896). In addition, failure to object forecloses review by the Colorado Supreme Court on writ of error. *Phelps v. People,* 152 Colo. 467, 382 P.2d 995 (1963); *Parrott v. People,* 144 Colo. 587, 357 P.2d 634 (1960); *Davis v. People,* 112 Colo. 452, 150 P.2d 67 (1944). The "question presented" was not properly before the Colorado Supreme Court, and it is, therefore, not justiciable in this court on certiorari, since no judgment of denial exists for review by this court. Additionally, since the question presented was properly not passed upon by the Colorado Supreme Court, the judgment is supported by an independent non-federal basis. *Cramp v. Board of Public Instruction,* 368 U. S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961).

## CONCLUSION

As to the first question presented, the decision of the Colorado Supreme Court is in harmony with the pronouncements of this court. The second and third questions raise no relevant legal issue. The fourth question is adversely disposed of on an independent non-federal ground. The petition for a writ of certiorari must be denied.

*Respectfully submitted,*

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